SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 609

[redacted]TSVILLE OIL MILL, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS

BRIEF OF APPELLANT

CHRISTIE BENET,
Attorney for Appellant.

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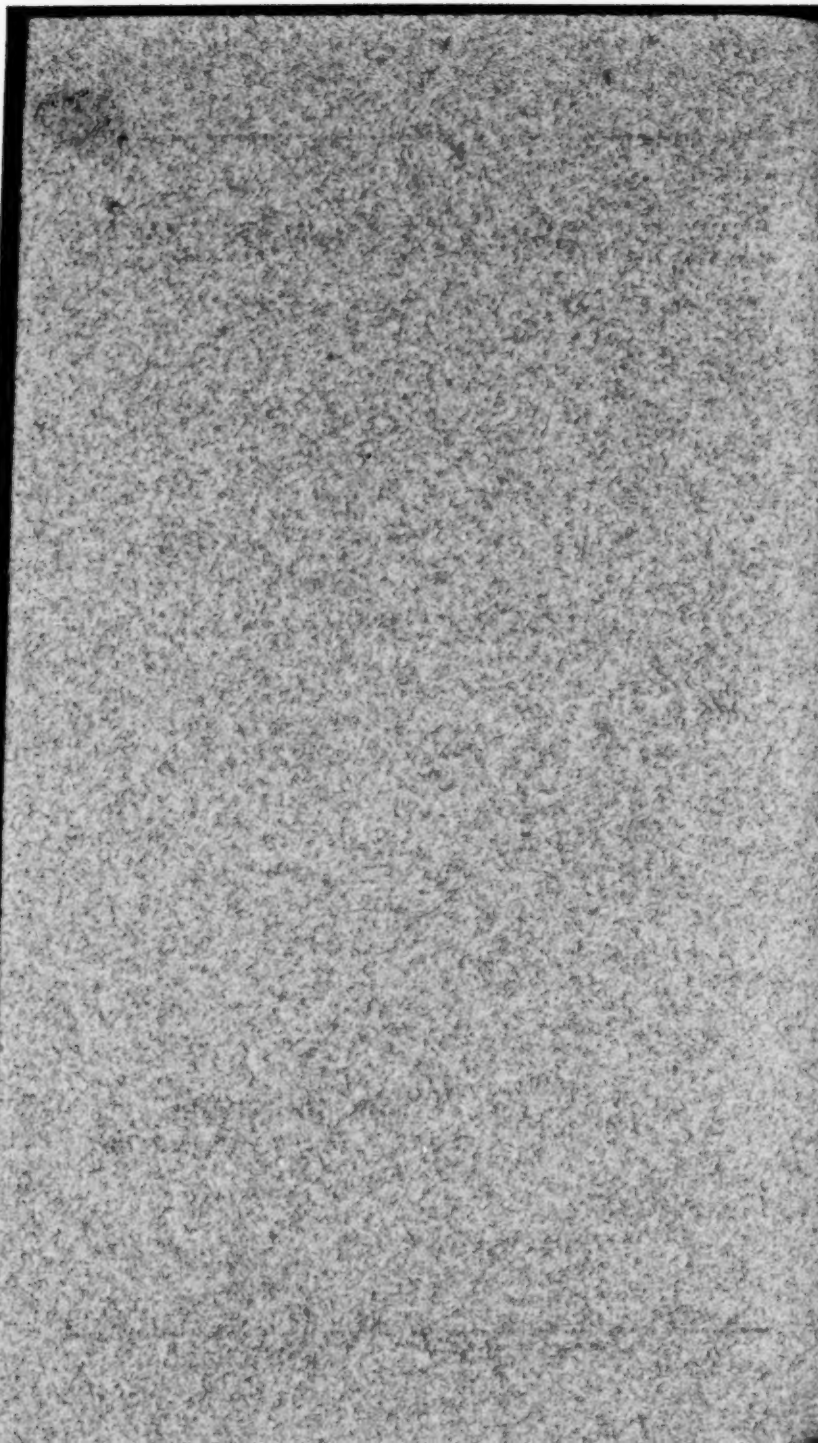

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I

STATEMENT OF FACTS

This is an appeal, under section 242 of the Judicial Code, 36 Stat. L. 1157, from a final judgment of the Court of Claims rendered May 11, 1925, dismissing the claim of this appellant which was for more than Three Thousand Dollars ($3,000.00). The printed reports are not yet available, but the decision is printed in full in the record (R. 64). (id. 60 Ct. Cls. — —.)

The appellant is one of 285 cottonseed oil mills (called hereinafter mills) whose claims arose out of a contract entered into with the government of the United States in 1918 for the production of cotton lin-

ters (the basis of nitro-cellulose) and their sale to the United States, during the years 1918 and 1919. Linters are the short ends of staple cotton which adhere to the seed after the lint is taken off for the manufacture of cloth. They are recognized as the best known basis for high explosives. The claims were presented to the Board of Contract Adjustment of the War Department (cases No. C 150-850) under the provisions of the Dent Act (40 Stat. L. 1272, Fed. Stat. Ann. Supp. 1919, page 304), and appeal was taken to the Secretary of War, as in said Act provided, from a decision of the Board denying relief. (R. 63.) The Secretary of War affirmed the action of the Board on May 18, 1920. (R. 63.) The opinions of the Board of Contract Adjustment and the Secretary of War are found in Decisions of War Department Board of Contract Adjustment, vol. II, page 314, and Vol. V, page 525, respectively.

On March 3rd, 1923, the claims of appellant and 284 other claimants were referred to the Court of Claims by the United States Senate under the provisions of section 151 of the Judicial Code. (R. 21, 30.) The case of appellant was tried in that Court, argued, and appeal taken to this Court from a decision dismissing the petition, dated May 11th, 1925. (R. 66.) By stipulation, the cases of the other 284 claimants filed and pending in the Court of Claims under this reference of the Senate are to be settled by the decision of this case.

In the Spring of 1918 all cottonseed oil mills of the United States were placed under the direct control of the United States Food Administration and the War Industries Board. This control was absolute and com-

plete, and was brought about by two factors. The first was the action of the War Industries Board in fixing the price of all linters on hand on May 2nd, 1918, and to be produced thereafter during the period ending July 31, 1919, at $.0467 per pound, f. o. b. points of location or production, and at the same time requiring that all mills should thereafter produce a minimum of 145 pounds of linters per ton of seed crushed, as compared with a normal production of commercial linters in peace times of about 75 pounds of linters per ton of seed.

As a part of said control all mills were required to sell all linters produced during the season 1918-1919 to the duPont American Industries, Inc., sole purchasing agents of the United States, and were not allowed during said entire period to sell any linters to any other person whatsoever. (R. 35.) Appropriate and heavy penalties were provided for the failure, neglect or refusal to obey the orders of the government as to this and other requirements, and no mill could operate without a license of the government. (R. 56.) When 75 pounds or less of linters are produced from a ton of cottonseed, the product is referred to as commercial linters, and when more than 75 pounds of linters are produced from a ton of cottonseed, they are called munition linters. Munition linters of 145 pounds cut have no value for commercial purposes.

The second factor was the action of the Food Administration, whereby the prices of cottonseed, of all the derivative products thereof other than linters (which were controlled by the War Industries Board

as above shown), the gross operating cost to the mills, the maximum freight allowance, and the profit to be made upon each ton of seed crushed during the period from August 1, 1918, to July 31, 1919, were fixed by governmental action. (R. 58, R. 11-pet.) The price as fixed in this scheme actually allowed the mills a profit of slightly more than 3% or $3.00 on an expenditure of $90.50. (R. pet. 11.) Further, an operating license was required for each mill for the continuance of business, which license provided that it would be revoked upon the failure, neglect or refusal of the licensee to comply at all times with all orders, rules and regulations of the Food Administration. (R. 56.)

Under this concerted plan of the governmental agencies as above set forth, all mills were required to pay the farmers $70 per ton (basis) for every ton of cotton seed purchased during the said period ending July 31, 1919, which included all seed produced from the entire cotton crop of the South for the season 1918-1919, and to sell all products derived from the crushing of cottonseed at the prices as fixed by the government. Under this war program the mills were acting only as the operating agents of the government under a plan which required them to finance all operations from their own funds, and which give them a profit on all cottonseed crushed and to be crushed of only $3.00 per ton. (R. 58, R. 11.)

This appellant and each of the mills subsequently received and signed a "Seller's Contract of Sale" (R. 43) which reduced to writing the orders, rules, regulations and understandings theretofore existing, all of which

were fully complied with by this appellant and all mills. By the execution of this contract, the United States was firmly bound to purchase from the mills all linters produced during the period from August 1, 1918, to July 31, 1919. (R. 44.) The said contract contained a cancellation clause, optional only with the government, which provided that the contract could be terminated by the government under the conditions therein stated, but only "in the event of the termination of the present war"—which clause was put into the contract designedly and had a legal meaning at that time which the mills relied upon. (R. 45.) The contract was not terminated or cancelled in accordance with the terms thereof, nor was any settlement ever offered to the mills under the said terms. (R. 60.)

After the armistice November 11th, 1918, and on November 28th, 1918, the government still exercising complete control over the mills, as aforesaid, directed them to discontinue the manufacture of munition linters and to revert to the manufacture of commercial linters, and this appellant and all mills complied with this direction at once. At the same time the government notified all mills that a definite and final arrangemen for discharging the obligations of the United States would be made within a few days. (R. 59.) Numerous conferences were held between the Linter Committee (representing this appellant and the other mills) and officials of the government, the Linter Committee always insisting that the government carry out the plain obligations of its contracts by taking all the linters for the entire season, as it was bound to do.

This insistence was at least in one instance reduced to writing by the Linter Committee, approved by the War Industries Board (acting through Mr. B. M. Baruch, Chairman, and Mr. Geo. R. James, Chief of the Cotton and Cotton Products Section thereof) which had in the first instance fixed the price of $.0467 per pound for munition linters. And it was also approved by the Food Administration. (R. 56, 57, 59.)

The Cotton and Cotton Products Section of the War Industries Board ceased to function and was disbanded on December 21, 1918, and thereafter its activities with respect to linters were taken over by the Ordnance Department of the Army, and the mills so notified. (R. 60.)

On December 30, 1918, the Ordnance Department, acting through General Pierce, notified the mills, through the Linter Committee, that the government would take only the linters then held by the various mills, inspected and tagged (but not paid for) amounting to 270,000 bales, and would take only a part of the linters to be produced between January 1, 1919, and July 31, 1919, (not over 150,000 bales of an estimated production during said period of 350,000 bales), the amount to be taken at July 31, 1919, to be prorated among the mills, and unless the mills accepted this (absolutely an ultimatum, whether so denominated in the findings or not) within one hour, by 7 p. m. of the same night, the United States would breach the contracts of September 26, 1918, and refuse to accept any linters whatever, either theretofore or thereafter produced. (R. 60.)

The situation in the cottonseed industry at that time,

as set forth in the petition and not questioned in the findings of fact, was as follows:—

The mills were under the orders, rules and regulations of the Food Administration and the War Industries Board, operating under license and compelled to pay the prices fixed by the Food Administration for cottonseed, and to sell their derivative products at the fixed prices. (R. 56.) They had on hand 270,000 bales of munition linters which were of no value for commercial purposes, which had been accepted, inspected and tagged by the agents of the government, but not paid for; (R. 16-pet.; 60); they had on hand approximately one million tons of cottonseed which they had purchased at the fixed price of $70.00 per ton (R. 16-pet.); and the farmers held approximately 480,000 tons of such seed, which the mills were obligated to purchase, under the pressure and control of the Food Administration, at a fixed price of $70.00 per ton; (R. 16-pet.); they had on hand derivative products of cottonseed worth many times the value of the linters, which they could not have disposed of without enormous loss unless the stabilization plan of the Food Administration was carried out during the entire crop year ending July 31, 1919. (R. 16, 17-pet.) The record shows that appellant, the Hartsville Oil Mill, was in a proportionate degree confronted with the situation that faced the entire industry.

Standing in the fear of the threat of the Ordnance officials and in the knowledge that refusal to accede to the demands of the Ordnance Department meant ruin for each of the mills and financial chaos in the South

(R. 17-pet.) the mills, having no appeal and not being on equal terms with the government and knowing that on account of the perishable product they were handling they could not wait on the action of the courts, and preserving their protest (R. 60) against the unjust and illegal action of the Ordnance Department, yielded to the demand of the government officials within the hour specified (R. 61) and acceded to the requirement of modification of the "Seller's Contract of Sale." This modification was immediately thereafter put in writing and is the matter here under consideration. This modification, the appellant contends, was procured through compulsion, is not to be deemed a voluntary act, and should in equity be set aside.

Later, on December 31, 1918, this appellant and all other mills were notified by telegram that the "Seller's Contract of Sale" was cancelled, and the duPont American Industries, Inc., sole purchasing agents of the United States were notified in writing on January 2, 1919, to refuse to accept any linters whatever from any mill which declined to execute the modification, above referred to. (R. 61.)

The government subsequently paid for all munition linters produced prior to December 31, 1918, by this appellant and all other mills, but before any linters were taken by the government or paid for, of those produced subsequent to January 1, 1919, and as soon as the governmental pressure was removed and made such action possible, this appellant and all other mills repudiated their modification of the original contract, and brought their action under the Dent Act as afore-

said, for appropriate relief. And at no period during the interim was there any indication whatever by this appellant or any other mill that it waived its protest, condoned the action of the Ordnance officials, or was content to abide the consequences of having executed the modification of contract—(R. 58). The Court of Claims found as a fact that the protest against the action of the government was not only made but (R. 60) was preserved.

In addition to the overwhelming governmental and financial pressure which confronted the mills it was set out in the petition and not questioned or modified by the findings of fact (R. 16 pet.) that the claimant and the other mills were committed and obligated to the farmers of the South and to the United States Food Adminisration to pay $70.00 per ton for each ton of cotton seed purchased during the entire season of 1918-1919, whether it was brought to the market early or late; that the Food Administration had advised the claimants and the other mills that if they failed to pay $70.00 per ton for seed, the Food Administration would no longer maintain the stabilization scheme and that the result thereof would be an enormous loss to the mills on the seed purchased and the products manufactured under said stabilization scheme. The element of good will in the entire industry, with the farmers, bankers and business men of the South was at stake and this fact was well known to and taken advantage of by the officers of the Ordnance Department (R. 16-17 pet.)

II

THE DECISION OF THE COURT OF CLAIMS IS CONTRARY TO THE FINDINGS OF FACT

In dismissing the claim of appellant the Court of Claims, without the citation of an authority, based its decision upon the following grounds:—

> 1. That it was immaterial to a decision of the case whether or not the signing of the armistice of November 11, 1918, constituted a termination of the present war within the terms of the cancellation clause of the contract of September 26, 1918.
>
> 2. That the government had the right on December 30, 1918, to cancel the contract of September 26, 1918, under the terms thereof.
>
> 3. That the appellant voluntarily signed the settlement contract and received the full amount from the government which the said settlement contract provided.
>
> 4. That there was no legal duress.
>
> (R. 65.)

1.

The fact that the appellant had a contract with the government which was in full force and effect, and wholly capable of enforcement at December 30, 1918, is not disputed. The only reason for controversy was the cessation of hostilities, and the interpretation to be placed upon the signing of the armistice of November 11, 1918, as such signing affected this particular contract. Had the use of ammunition been continued,

the appellant would have continued to manufacture munition linters, and the government would have continued to take them at the fixed price, during the contractual period which ended July 31, 1919. (R. 36, 43.)

But the armistice apparently caused the government officials to doubt the expediency of continuing the accumulation of munition linters, which are not commercially valuable, although the armistice was a suspension of hostilities for a period of thirty days only, according to its own terms.

An examination of the linter contracts was therefore made and it was noted that they could be terminated "in the event of the termination of the present war", and in that event only. It therefore became necssary to determine whether or not the contracts were terminable at that time. The Ordnance officers insisted that the war was over, in legal contemplation and that there was consequently no further demand for munition linters. They assumed and maintained this position notwithstanding the decisions of this Court in *Hijo vs. U. S., 194 U. S. 315; The Protector, 12 Wall. 70;* and the decision of the Federal Court in *Commercial Cable Co. vs. Burleson, 225 Fed. 99*, wherein another arm of the government at the same time was insisting that, in view of the fact that the armistice did not constitute a termination of the present war, the President was authorized under his war powers to assume control of the trans-Atlantic cable, and the Federal Court sustained this position.

It was therefore not only material, but essential to a decision in this case, to decide whether or not the armistice created the condition precedent to the can-

cellation of the linter contracts under the terms thereof, for if he war had terminated, the right of cancellation existed, but if the war had not terminated, there was no such right. And it is not sufficient that it should be urged that the Ordnance officers thought that the war had terminated, thus enabling them to cancel the contracts. The fact must be legally established, otherwise any settlement based upon such fact would be of no effect.

The erroneous interpretation and illegal effect of the signing of the armistice applied by the Ordnance officers formed the only basis for the controversy, and the settlement contract which was forced on this appellant and other mills was predicated upon such interpretation and effect. The materiality of a decision on this question is therefore apparent.

2.

The Court of Claims held that the government had the right to cancel the contract of September 26, 1918. (R. 65.) The answer of the appellant is, that the government had the right to breach the contract at any time between September 26, 1918, and July 31, 1919—that same right which any contractor has to breach a contract when he is willing to respond in damages. But there was no right to cancel the contract at December 30, 1918, under the terms of the contract, as insisted upon by the government, because such right had not been included in the provisions of the contract.

There is some further question as to whether or not the government had the right to even breach the contract in the manner in which it threatened to breach it, (R. 60) without certain liability in addition to the actual damages occasioned by the breach. The findings of fact show that there were some five hundred mills situated in sixteen states, engaged in the manufacture of linters. They were given collectively one hour in which to agree to a modified contract or suffer the consequences of the refusal of the government to pay for such munition linters as were then in their hands, amounting to 270,000 bales, and which had been inspected, accepted and tagged, and were then and there the property of the government. There can be no question regarding the lack of fairness on the part of the government in the whole transaction.

We find in the case of *Freund vs. U. S., infra.*, the attitude of this Court in respect to the "questionable fairness of the conduct of the government" cited and approved in *Nelson Co. vs. U. S. 261 U. S. 17*, and it is submitted that the facts in the *Freund case* show no such utter disregard for the rights of the claimants as is apparent in the instant appeal.

3.

The Court of Claims states:

> "It is true that the plaintiff protested against signing the contract—"

And in the same paragraph:—

> "The plaintiff exercised its discretion and voluntarily signed the settlement contract." (R. 65.)

It is difficult to reconcile these two statements, one of which is the very antithesis of the other. And when it is considered that the offer in the form of an ultimatum, the protest, and the acceptance under protest of the terms of the offer, all took place within the space of one hour, and that there were some five hundred mills located in every state in the South involved, the fallacy of contending that each and every mill acted freely and voluntarily is apparent.

The Court further held:—that the appellant,

> "* * * with full knowledge of all the circumstances, executed the settlement contract, received the full amount from the government which the contract provided, and is now asking that the settlement contract be set aside * * *" (R. 65.)

An examination of the record shows that this statement has no foundation in fact, and is in direct contradiction of the record in the case.

When the settlement contract was forced on the appellant and the other mills, the government took the precaution to see that the terms imposed by it on December 30, 1918, should not be avoided by any mill, and it instructed the duPonts, sole purchasing agents for the government, that if any mill declined to agree to the terms imposed, and refused to sign the agreement which embodied those terms, the agents should

refuse to accept from such mill any linters whatsoever, either manufactured or to be manufactured, and the Ordnance Department and the United States would stand behind them. (R. 61.)

This instruction was never rescinded, and it is apparent that while the same was effective, the same measure of coercion, compulsion and restraint that forced the appellant and the other mills to agree to the terms laid down on December 30, 1918, still obtained in full force and effect.

There was never at any time any action on the part of this appellant or any other mill which tended to show that it consented to condone the act of December 30, 1918, and abide the consequences. The terms of the settlement contract were wholly executory until July 31, 1919. Under the provisions of the Dent Act of March 2, 1919 (*40 Stat. L. 1272, Fed. Stat. Ann. Supp. 1919-304*) all claims presented thereunder were to be filed with the proper department before June 30, 1919, and the record shows that the claims of this appellant and all other mills were so filed, based upon the same cause of action as set up herein.

It therefore cannot be seriously contended that this appellant acquiesced in the settlement contract or that it failed to repudiate it and apply for the proper relief within a reasonable time, notwithstanding the continuing duress. The appellant moved with much more celerity than did the plaintiff in the case of *United States vs. Smith, infra.*, involving a like element of compulsion, where the period was five years, and in the case of *Swift Co. vs. U. S., infra.*, the period was eight and

one-half years. There is the further fact that neither this appellant nor any other mill received one cent under the terms of the settlement contract prior to the date that the settlement agreement was repudiated, and during the period from January 1, 1919, to June 30, 1919, the appellant and all other mills preserved their protest, as was specifically found by the Court of Claims (R. 60).

4.

The Court of Claims held that there was no duress in the legal sense of the word. This follows as a necessary conclusion from their statements in the opinion. The findings of fact, however, show that all the elements of duress were present. Finding No. XVIII (R. 60) shows that the officials of the government told the appellant and the other mills that if they did not accept the terms laid down by the Ordnance officers within one hour from the time of the offer or ultimatum, then the government would breach the contract of September 26, 1918, and refuse to accept any linters whatever, either cut or uncut, leaving in the hands of the appellant and the other mills more than six million dollars worth of product not paid for and useless and unsalable for any other purpose, although the government had theretofore accepted such product. Finding No. XX (R. 61) shows further that there was to be no temporizing or evading of the terms laid down by the Ordnance officers—they were not given to idle threats—for the duPonts on January 2, 1919, were specifically instructed in writing to carry into effect the verbal threats of December 30, 1918.

The statements appearing in the opinion of the Court of Claims do not square with either the law or the facts of this case, taken as a whole. In brief, this appellant, on December 30, 1918, had a valid and existing contract with the government which was effective until July 31, 1919. The officers of the government, in their zeal for its interests and probably without malicious intent, conceived the purpose of saving the government from what appeared to be a loss upon linters. They accordingly engendered a dispute and brought before them this appellant and other mill representatives who were forced by their acts to assume the position of suppliants for justice, and unfolded to them a plan which was born of an incorrect and illegal interpretation of the contract rights, and based upon a false premise. This plan finally matured in the so-called settlement contract, which shows on its face that it was wholly unilateral (R. 51, fol. 94) and this settlement contract was forced on this appellant and the other mills against their will, over their protest, and under conditions constituting compulsion, squarely within the principles recognized in *Freund vs. U. S. 260 U. S. 60*, hereinafter set forth and discussed.

The Court of Claims suggests that the case of appellant may be a hard one, but that it possesses no dispensing powers. The appellant is not before this Court seeking the exercise of any dispensing powers not possessed by this Court, but rather to obtain that simple justice and to ask for that standard of honesty and fair-dealing that should always characterize the deal-

ings between this government and its citizens.

The final view of the Court of Claims in its opinion is expressed in the following language:—

> "The plaintiff's case may be a hard one but this court possesses no dispensing powers; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to parties, *and there has been no fraud, circumvention, or illegality in the case*, the Court is bound to enforce the agreement." (R. 66.) (Italics ours.)

There are two thoughts that immediately suggest themselves by this statement. The first is, the definite announcement of the rule that, although the appellant's case may be a hard one—which of itself suggests that it is a case of real injustice—no relief whatever may be granted unless there has been "fraud, circumvention, or illegality." No such rule, restricting relief in equity, has ever before been laid down by this or any other Court so far as we know. In the numerous decisions of this Court, which will hereinafter be referred to, such as the *Smith case*, this Court has repeatedly held that in dealings between the government and a private contractor, where the contractor has been forced to proceed under a false and illegal interpretation of the rights of the government made by government officials, and he has proceeded, though

under protest, under circumstances of compulsion, coercion, restraint, or whatever name may be applied to the situation, the Court is justified in setting aside the contract as so interpreted. Further, these cases hold that the contractor is entitled to proceed in the proper Courts to assert his rights under the original contract, notwithstanding he proceeded with the new contract forced upon him by officials of the government, he having preserved his protest.

In such cases there is no charge of fraud, which would have to be distinctly and clearly alleged and proved; there is no charge of circumvention, which is but another name for fraud—"the act of prevailing over another by fraud or artifice"—(Webster's definition), and there is no charge of illegality to be sustained, in order to assert rights which have been modified and denied by the compulsion of the government.

The rule laid down by the Court of Claims in this case is contrary to what must now be regarded as the settled principles relating to the rights of those having contracts with the government.

It is apparent that the Court of Claims rested its decision in this case on the proposition that a contractor with the government, who has been compelled to proceed under a modification of his contract and at the insistence of the government upon its misinterpretation of the legal rights of the parties, may have no relief whatever unless he can substantiate a charge of fraud against officers of the government, and show that their acts were contrary to the statutes or illegal in some other sense. We respectfully submit that this view is

fundamentally unsound, has no support and is denied in the cases decided in this Court.

It is possible to demonstrate readily the unsoundness of this view of the Court of Claims. If the appellant does convict the officers of the government of fraud, it is doubtful whether he could maintain his case at all in the Court of Claims, for he would have a tort action which is not cognizable by that Court. *Livingston vs. U. S. (1925) 60 Ct. Cls.*, — —.

To say that no relief can be granted under circumstances, other than fraud, circumvention or illegality is denying the power of the Court of Claims ever to set aside a contract on equitable grounds—a power which that Court has repeatedly exercised, and a power which has also been exercised by this Court in many cases hereinafter referred to.

Second, the comment of the Court of Claims that it does not possess dispensing powers where there is a hard case and no fraud, suggests the question why the Court completely ignored the reference of this case to the Court of Claims by Congress, with direction to determine and report to Congress "the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States—" (Sec. 151 Judicial Code, 36 Stat. L. 1138, 5 Fed. Stat. Ann. 655.) The only action of the Court was dismissal of the petition and the entry of a judgment against the claimant for costs. (R. 64.)

III

THE POSITION OF THE GOVERNMENT

It is desirable next to consider the position of government counsel before the Court of Claims, which it may be assumed will be the position taken by the government in this Court.

The government denies the right of the appellant to recover on the following grounds:—

1. The settlement contract was fully carried out.
2. The signing of the armistice on November 11, 1918, was a termination of the war within the meaning of the cancellation clause of the contract of September 26, 1918.
3. The terms and conditions of the settlement contract were consented to and agreed upon by both parties.
4. The appellant was guilty of laches.
5. The appellant agreed to and signed the settlement contract because of financial and economic necessity.
6. The consideration for the settlement contract was the settlement of disputes existing at the time of signing.

1.

It should be borne in mind that the settlement contract was wholly executory until July 31, 1919, at which time the government undertook to take up and pay for certain linters which would be manufactured

between January 1, 1919, and July 31, 1919. (R. 52.) The settlement contract also provided that the government should take up and pay for the 270,000 bales of munition linters, which were in the hands of the mills on December 31, 1918. There was manifestly no consideration for this apparent concession—it was no more than an acknowledgment on the part of the government of its failure to perform the terms of the contract of September 26, 1918. This six million dollars worth of lint was the property of the government on that date, and the Ordnance officials threatened to refuse to pay for these munition linters already manufactured under government regulations, or to take and pay for any linters whatsoever.

The government did nothing prior to July 31, 1919, under the settlement contract which it was not obligated fully to do under the original contract and during the preceding month of June this appellant took the most effective steps to set the settlement contract aside. Whatever action the government took after June 29, 1919, the date the claims of the mills were filed with the Board of Contract Adjustment, was taken with full knowledge of the position assumed by the mills in regard to the modified contract.

2.

The government contends further that the signing of the armistice of November 11, 1918, was a termination of the war within the meaning of the cancellation clause, and argues from this premise that the position assumed and maintained by the Ordnance officers on December 30, 1918, was legally sound.

This contention cannot be seriously considered, for the law was well settled on the subject at that date. (*Hijo vs. U. S., 194 U. S. 315; The Protector, 12 Wall. 70; Commercial Cable Co. vs. Burleson, 225 Fed. 99.*) But it is urged that these authorities have been nullified and set aside by the case of *Duesenburg Motor Corp. vs. U. S., 260 U. S. 119*, in which it is said:—

> "The government might terminate the contract in the interest of the public welfare; and the war might cease. The latter did happen."

This case was decided in 1922, and it was a matter of common knowledge *in 1922* that the war was suspended on November 11, 1918, and was never resumed. This Court did not say *that* the war ended on November 11, 1918, and that the fact was known at that time.

It is further contended that the statement of President Wilson before both houses of Congress, on November 11, 1918, is authority on the subject of the termination of the war within the contemplation of these contracting parties. In his speech on that date he said, in dramatic manner:—

> "The war thus comes to an end", and
> "We know only that this tragical war * * * is at an end."
> (Congressional Record of November 11, 1918.)

The armistice was, by its own terms a cessation of hostilities for a period of thirty days. It may have been believed that the armies of Germany and its allies in the war had been rendered impotent to continue the

struggle, but at the very time the President was giving utterance to the words above quoted, it was being asserted in the Federal Court in the *Commercial Cable case, supra,* that the President had the authority to take possession and control of the trans-Atlantic cable under his war powers, *because the war had not ended.* And the court held in the Cable case that he had the power because the war had not ended. In any event the statement of the President could not alter the legal fact. It is not alleged or contended that the contracting officers of the government had any knowledge of this statement, but they were presumed to know the law on the subject. And even had they known and relied upon the statement of the President, this would have given them no authority to brush aside the legal status and assume a position which enabled them to cancel, breach, terminate or remold contract at will to the injury of the contracting party.

3.

Another contention of the government is that there was a ratification of the settlement agreement by the appellant and the other mills. This contention has no basis in fact, as has been heretofore shown. Instead of ratification, there was a distinct and formal repudiation of this agreement by the filing of claims with the Board of Contract Adjustment.

The Court of Claims sets out in its findings of fact a memorandum signed by two officers of the government and by Senator Benet, counsel of the mills, on January 2, 1919, and construes this to be a ratification of the settlement contract. (R. 63.)

This memorandum means just what it says, and it cannot be tortured into a ratification of the settlement contract by any of the signers to the memorandum. It was signed by all parties in view of the fact that Mr. Baruch and Mr. James of the War Industries Board, whose attitude regarding the settlement contract was desired, were absent from the city. The statement reads, that each of the signators was of the opinion that, had Mr. Baruch and Mr. James been present, they would have ratified the settlement agreement. It was simply an expression of opinion on the part of each signer of what he believed to be the attitude of mind of Mr. Baruch and Mr. James; and it is not unreasonable to believe that had either Mr. Baruch or Mr. James been present, they might have refused to give their consent to the terms of the agreement.

In any event neither Mr. Baruch nor Mr. James represented the mills—their interests were on the side of the government. The only reason for the memorandum at all was the desire on the part of the Assistant Secretary of War to have the approval of Mr. Baruch and Mr. James as a matter of courtesy. The War Industries Board had officially ceased to function three days prior to January 2, the date of the memorandum (R. 15) and actually had closed on December 21, 1918, so far as cottonseed products were concerned. The approval of these gentlemen was a mere gesture at the most.

It should be remembered that on January 2nd, 1919, this appellant and all other mills were in the same position that they occupied on December 30, 1918, except that the government had taken measures to see that

none of the mills should refuse to execute the agreement which embodied the terms of the ultimatum of December 30, 1918. On December 31, 1918, each mill received from the Government a telegram cancelling the contract of September 26, 1918. The government on January 2, 1919, instructed the duPonts in writing to refuse to accept any linters from any mill that refused to abide the terms of the settlement agreement, which had been forced on the mills by General Pierce on December 30, 1918. (R. 61.)

4.

The government relies further on the allegation that the appellant and the other mills were guilty of laches, and for that reason should not prevail. See the opinion in this respect. (R. 64.)

It has been heretofore shown that this contention cannot be seriously considered. There were some five hundred mills which were affected by the action of the Ordnance officials, all operating at December 30, 1918, under a uniform contract. Action was taken within a period of six months after that date, which would seem to be a reasonable time, in view of the fact that the claimants were located throughout sixteen states. The Court of Claims found that there was no laches. (R. 64.)

Attention is directed to the length of time elapsed in other cases of this nature, for a comparison. In the *Freund case, infra*, the contractor operated under an erroneous construction of the contract for a period of sixteen months, and there was but one contractor;

in the *Smith case, infra*, the period of elapsed time was five years, and in the *Swift case, infra*, the period of time was eight and one-half years.

5.

The government contends further that the settlement contract was agreed to because of the financial and economic necessity of the appellant and the other mills.

It is true that the appellant and the other mills needed funds for the continuance of their business, and feared financial disaster should they refuse to accept the terms laid down by the Ordnance officers. It is also true, as has been heretofore shown, that the appellant and the other mills did not have full and complete control of their respective plants—they were controlled by the War Industries Board and the Food Administration as effectively at December 30, 1918, as they had been during all the year 1918.

The primary cause of this need for funds was the total failure on the part of the government to pay for the linters produced under the contract of September 26, 1918, with any degree of promptness, with the result that the mills had on hand more than six million dollars worth of unsalable product which belonged to the government and had not been paid for. This naturally threatened the mills with financial disaster and at the same time tended to create a lack of confidence in the financial situation of the entire South with respect to the cotton seed oil industry and banks and farmers upon which they were dependent. In short, the government had and was withholding more than

six million dollars, which was the property of the mills, at December 30, 1918, and had this money been in the hands of this appellant and the other mills, the alleged financial pressure would not have existed to the extent that it did.

As far as the mills were concerned, the sole reason for agreeing to the terms of the settlement contract was the fact that the government had said to this appellant and the other mills, "If you do not agree to the terms we offer, we will not pay the six million dollars we owe, and further, we will not pay for the 330,000 bales of linters which you will produce between now and July 31, 1919." This was the financial necessity and economic pressure upon the mills, which was calculated to and did overcome their minds, and robbed them of their freedom of action. (R. 60.) And this does not take into account the moral obligation of the mills to the Food Administration and the farmers.

There is the further suggestion that counsel for the mills assisted in the preparation of par. 8 of the letter of the Ordnance Department to the duPonts authorizing the duPonts to refuse to accept from any mill any linters whatever, if it failed to execute the modified contract. (R. 61.)

This suggestion is fallacious, and the absurdity of the contention is readily apparent. In this paragraph 8 the United States undertook to indemnify the duPonts against any damages they might suffer, by reason of refusing to accept any linters whatever from any mill which declined to execute the modified contract.

If we apply this suggestion to the situation of the appellant, we would have the appellant agreeing that the government should indemnify the duPonts, for their refusal to take any linters from the appellant —a reductio ad absurdum.

This paragraph was inserted in this letter at the sole instance of the duPonts, to insure themselves— nor did the mills have anything to do with it, for they had no interest in the relations between the duPonts and the government.

It is the fair construction to be placed on this paragraph to say that the government, as well as the duPonts, fully realized that the obligation of the government was to take all linters produced by the mills until July 31, 1919. In order to avoid any liability for refusing to take up the linters, the duPonts asked the government to save them harmless and this the government agreed to do. The appellant was not only not a party to this underwriting but had no interest whatsoever in the matter.

6.

The sixth and last contention of the government is, that the government was released by the settlement agreement, from its obligations under the original contract, the consideration of the settlement agreement being the settlement of disputes existing between the contracting parties.

This contention cannot be maintained, as an examination of the preamble of the modified contract shows on its face that it is wholly unilateral. It first recites that disputes have arisen between the Buyer and the Seller, and states:—(R. 51, fol. 94.)

> "Whereas, it is for the best interests of the United States to arrange for a settlement of said disputes by a modification of said contract, under which modification the Buyer will be required to receive and pay for a less quantity of linters than is provided by the terms of the contract aforesaid."

It may be pertinent at this point to inquire, Who engendered the disputes? If the government did so, should it now be permitted to take advantage of the disputes for which it is alone responsible?

The appellant and the other mills questioned the legality of the basis upon which the right to cancel the contract was founded. The government simply said we will do so much and no more, which is less than we are now obligated to do (as this preamble to the modified agreement shows); we will give you, five hundred mills in all, one hour to make up your minds; and if you do not accept the terms which we offer, we will do nothing. This position was assumed and maintained, no alternative was offered, and in the words of General Pierce, spokesman for the government, "you can take it or leave it." This is the settlement of the disputes upon which this contention is based.

The government stresses the case of *Silliman vs. U. S. (1880) 101 U. S. 465*, but the case has no application here. The question in that case was, Was there sufficient evidence or proof of duress to entitle the claimants to recover? The Court answered in the negative.

The claimants were the owners of certain barges which were operated in and around New York. Early

in 1863 they entered into charter-parties with a contracting officer of the government for the hire of the barges at a fixed rate, and were regularly paid the agreed rate until November 1, 1863.

On June 2, 1863, the charter-parties being in full force and effect, the Quartermaster General ruled that no more barges should be chartered at a rate to exceed $4.00 per ton per month, registered tonnage. The contract rate of claimants exceeded this rate. The claimants were notified of this ruling, and replied that they preferred to have their barges returned than to let them at the proposed rate.

The barges remained in service, however, and nothing was done until December 10, 1863, when the contracting officer was notified that he must take steps to bring all barges under his control within the contract rate, and cause the owners to execute new charter-parties at the reduced rate, *such rate to be effective as of April 1, 1863.* On December 14, 1863, the claimants were notified of this proposal. They had before them, since June 2, the proposed form of charter-party which they had declined to execute, and they had received their regular monthly hire at the rate stated in the original charter-party. They were also notified that their barges would be retained in service, and no further payments would be made them, unless and until the new form of charter-party (effective April 1, 1863, as to the rate of hire) was executed. The claimants declined, and demanded the return of their barges, which demand was refused.

On January 8, 1864, the claimants complained to

the Secretary of War, stating the refusal of the government either to return their barges or pay them hire for November and December, 1863, and stated that they desired to sell the barges because they required money to pay their crews. Thereafter, after certain offers and counter-offers and with mutual concessions, the new form of charter-party was executed on May 16, 1864, and the effective date as to hire was made November 1, 1863, rather than April 1, 1863, as formerly proposed. And during all the period from November 1, 1863, to May 16, 1864, their barges remained in service and there was nothing to show that the crews were not paid, nor that the claimants had any difficulty in obtaining money for the payment of the crews.

Here there were concessions and a compromise on both sides—the government extended the effective date of the new charter-party for a period of seven months, and gave up a claim against the owners for seven months' excessive hire, and the claimants, in consideration thereof, agreed to and did execute the new charter-parties. On the question of duress there is but the statement, and no proof, that the claimants needed money for the conduct of their business, and they could not have been in any dire necessity, from the fact that they operated the barges from November 1, 1863, until after May 16, 1864, without receiving any money for the use of the barges, and without protest, and in fact there was no indication that what was finally done was done under protest at all. This, in the light of the best considered cases, is sufficient to dispose of the action.

The claimants subsequently sued for the difference between the rate named in the original charter-party and the rate under the new charter-party, and for certain damages. Mr. Justice Harlan delivered the opinion of this Court, saying:

> "They yielded to the threat or demand of the department solely because they required, or *supposed they required* money for the conduct of their business or to meet their pecuniary obligations to others."
>
> "There is present no element of duress, in the legal acceptation of that term."

Some 45 years have passed since that decision, and it is submitted that the principles relating to legal duress have undergone a change during that period of time. Further, an examination of the decisions of this Court shows that the *Silliman case* has been cited as authority but once, so far as we can find, and that citation is in support of a statement that the allegation of duress could not be substantiated for lack of evidence or proof.

In the case of *Coppage vs. Kansas, 236 U. S. 9* (1915), a Kansas statute provided a penalty for any employer or his agent who should compel any employe to withdraw from a labor union as a condition of continued employment. One Hedges was a member of the Switchmen's Union and an employe of the Frisco railroad at Fort Scott, Kansas, of which Coppage was the local superintendent.

Coppage presented a statement to Hedges to be signed stating that he withdrew from the Union.

Hedges refused to sign, and was thereupon discharged. He invoked the statute and Coppage was convicted.

This Court reversed the Supreme Court of Kansas, and as to the allegation of duress, said:

> "But aside from the matter of pecuniary interest" (a $1,500 insurance policy in the Union) "there is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests."
>
> *(Citing Silliman vs. U. S., Supra.)*

This case establishes what this court believes to have been decided by the *Silliman case*—not the applicable principle of legal duress, but the failure to establish the very elements which constitute duress. It is therefore, we submit, apparent that the *Silliman case* has no application to this appeal.

IV

THE POSITION OF APPELLANT

The appellant claims and contends:

1. The condition under which the modified agreement was executed show that the situation was one of compulsion and coercion, under circumstances where the parties were not dealing on equal terms.
2. The execution of the modified contract therefore does not relieve the United States from the obligations of the contract of September 26, 1918.

1

The situation of appellant and the other mills, at December 30, 1918, as heretofore set forth, is essential to a proper consideration of this case. It is sufficient to point out that at that date the contract of September 26, 1918, was neither disputed nor was it disputable. The contract provided that the government should take all linters produced during the crop year ending July 31, 1919, at the price which the government had fixed, except "in the event of the termination of the present war." This situation had not come to pass, and there was no clause in the contract which made cancellation optional at any time with the government. (R. 45.)

The Ordnance officials conceived the plan for the cancellation of this contract, not because it was ter-

minable under its terms, but because they insisted that in view of the arimistice, there was no further demand for munition linters for the manufacture of gunpowder. They therefore contended that the war had terminated within the meaning of the cancellation clause, contrary to the law as well established, and knowing the situation of the appellant and all other mills in the industry at that time, compelled the acceptance of the modified contract which embodied only such terms as the Ordnance officers saw fit to grant. (R. 60.) The offer of the Ordnance officials was made with full knowledge on the part of the said officers that the appellant and the other mills could not refuse to accept, and the modified contract was the result of compulsion, coercion, and restraint upon the freedom of action of this appellant and the other mills.

There was no freedom of action possible on the part of the mills. They were faced with the situation heretofore set forth, and were precluded from refusing *any* offer by the government, even had that offer embodied much less than the terms of the modified contract. The Ordnance officers stated no alternative, and no compromise was suggested; General Pierce as spokesman for the government simply said, "So far as I am concerned, the war is over, and the government is not going to take any more linters." This appellant and the other representatives of the mills were impressed with his firmness and knew that he had all the power of the government behind him. To paraphrase the language of this Court in the case of the *United States vs. Smith, infra*, the view of the contract enter-

tained by General Pierce made evident the uselessness of soliciting or expecting any change from him; his conduct was repellant of appeal, or any alternative but submission, with its consequences.

The Board of Contract Adjustment denied relief to this appellant and the other mills holding there was no restraint of the person or actual withholding of tangible property—applying the doctrines of technical duress between private persons—and concluded that the Secretary of War did not have the authority to adjust or pay the claims of this appellant and the other mills. (Decisions of War Department Board of Contract Adjustment, vol. II, 314.)

The main question in this case is, Is there an obligation on the part of the government, under the principles established by this Court, to reimburse the appellant for losses suffered, notwithstanding its submission to the arbitrary cancellation and modification, its protest thereto having been duly preserved?

Any argument as to the application of the rules of duress obtaining between individuals dealing on equal terms and at arms' length is beside the mark, for here we have a situation of compulsion, coercion and restraint growing out of the relation between the various agencies of the government and citizens with whom it contracted and over whom it had control during the war, and under circumstances of power and control, well known to this Court, where the parties could not be said to be dealing on equal terms. Similar situations have had the consideration of this Court in recent decisions and we find the principles there stated

which afford an answer to the question here under consideration.

Freund vs. United States, 260 U. S. 60

This case grew out of a contract for carrying the mails. The Postoffice Department accepted plaintiff's bid and entered into a contract for service on a particular route for a certain annual gross sum. The contractor was to begin July 1, 1911. The Department, not being ready on that date or for more than a year afterward, substituted another and more burdensome route for the one bid upon, doing this in reliance upon certain clauses in the contract and notice to bidders, which it contended, gave such right of substitution. The contractors protested, but being threatened with cancellation of the contract and suit on their bond if they did not acquiesce in the terms laid down by the Department, submitted to the government's interpretation of the contract, performed the service required on the substituted route, and accepted periodical payments for several months, although the cost of services was many thousand dollars more than they were paid.

The Court of Claims allowed some additional compensation above that which the contractors had received (56 Ct. Cls. 15), and concluded that it was unnecessary to determine whether or not the new route was substituted for the old, because the contractors had acquiesced in this view by performance.

One contention of the government was:

> "Nothing was done by the postmaster at St. Louis nor by the representative of the Post Of-

> fice Department which in any way prevented the appellants from exercising their own judgment and will as to their future course of conduct."

In the instant case we have the identical situation, for the Court of Claims said:

> "The plaintiff exercised its discretion and voluntarily signed the settlement contract." (R. 65.)

And further in the *Freund case*, the government contended:

> "If the contractor, in spite of his assertion as to the illegality of the claim, and irrespective of his protests, nevertheless entered upon the performance of the contract, distinctly understanding the terms proposed by the other party as the only terms upon which performance would be accepted, the law imposes no obligation upon the other party to reimburse the contractor for expenses incurred in excess of those which the other party distinctly stated as the limit of his liability."

In the instant appeal the limit of liability was stated by the government to be less than the actual legal and contractual liability existing at the time, and this liability was stated by the Ordnance officers to be the maximum that could be expected from the government. In addition, the element of time in the two cases deserves consideration. In the *Freund case* several days'

time was allowed the contractor in which to accept or reject the offer of the Department, and there was but one contractor. In this appeal the time allowed for the decision was one hour, and there were more than five hundred contractors located in some sixteen states. (R. 60.)

The issue in the Freund case was squarely raised—was the contractor barred by having accepted the illegal interpretation of the contract by agents of the government and receiving periodical payments, having duly protested? This Court had no difficulty in rejecting the contentions of the government and finding that the contractor was entitled to recover the reasonable value of services for sixteen months, including a fair profit.

In rejecting the government's contention that the contractor had released the government by accepting and acquiescing in the interpretation of the contract made by the Post Office Department, this Court found:

> "That at the time the contract was executed the Department had formed the purpose to thrust on the contractor this burdensome route, but it did not advise them of it until ten days before July 1st, and, indeed, did not give them the exact schedule until the day before they were to begin it. Then the only course open to them was either to engage the old contractor's equipment at a heavy loss, or throw up the original contract and run the risk of the government's reletting at a higher bid and charging the possible heavy difference in cost to it against them on their bond for a five year contract."

The contractors protested and insisted that the performance of the service on the substituted route was not within the terms of their contract, but were advised by an agent of the Department that it was his business to see that they performed, and if they refused, they would be sued on their bond. This Court concluded that, under the circumstances there was no acceptance of the new route which would bar recovery.

The controlling element in the *Freund case*, which is present in the instant case in even greater degree, is expressed by the Court in saying:

> "We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted upon."

And

> "But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remold the contract at will."

There was no discussion of the restraint of person or the withholding of personal property, which element was contended was essential to establish duress as between private persons.

The *Freund case* has been cited with approval in a subsequent decision, *Nelson Co. vs. U. S., 261 U. S. 17*, and its scope in that case has been even more clearly defined.

In the *Nelson Case* there was a contract with the government requiring an amount of lumber to be supplied to the government, with an option on the part of the government to take more. The government, during the term of the contract, took an amount in excess of the quantity named in the contract, at the contract price. The claimant thereafter brought suit for the difference between the contract price and the market price of the excess so supplied:

This Court said:

> "The plaintiff relies on the opinion of this Court in *Freund vs. United States*, 260 U. S. 60. The facts of that case are very different from this. *They involved conduct on the part of representatives of the government of questionable fairness toward the contractors* and showed no such acquiescence and absence of protest as here appear."

Even the minimum of the facts in the case at bar come within this interpretation of the *Freund case.* We think that it is fair to say, after reading the opinion of the Court of Claims and of the Board of Contract Adjustment, that the conduct of General Pierce, who was the executive official in charge of this matter for the government, was one of questionable fairness, to say the least. And we have shown herein that there was no acquiescence, that there was a protest, and a preservation of protest. (Finding XXIV, R. 64.)

This Court in the *Freund case* declined to give judicial sanction to such conduct on the part of officials of

the government, rejected all contentions of the government and held for the contractor.

Hunt vs. United States, 257 U. S. 125

The above case was cited and relied upon by Chief Justice Taft in delivering the opinion in the *Freund case*. The *Hunt case* also applied simple principles of justice between the contractor and the government, and such application required the setting aside of an acceptance, settlement or a receipt made or entered into because of the arbitrary action and interpretation of a contract by officials of the government.

The contractor in the *Hunt case* had a mail contract in the City of Chicago, and was ordered to perform service to and from street cars by the Postmaster General, who insisted that such service was within the terms of the contract. The contractor accepted the ruling under protest, performed the service and receipted for payments. This Court gave the contractor relief, notwithstanding his acquiescence in the erroneous interpretation, his acceptance of payments, etc. His right to recover was assumed, and the principal discussion in the case was on the question whether the contractor would be entitled to recover in view of the fact that service had been performed by a sub-contractor.

This Court held that he could recover, reversed the Court of Claims and remanded the case for further proceedings.

The claimants in the *Freund case* cited and relied upon the above case, which involved the setting aside of the arbitrary interpretation of a contract for dredging, although the contractor acted under such interpretation, performed the service, accepted the payments and gave a receipt, but all under protest.

The appellees had entered into a contract with the army engineers to excavate a ship channel in the Detroit River, the material to be excavated specified to be clay, sand, gravel and bouleers. During the term of the contract Col. Lydecker, in charge of the work, extended the time for completion and ordered the appellees to work at certain designated places. The material to be removed from such places was limestone rock and limestone bedrock.

The appellees protested against removing such material and asked for an extra price for doing the work. Col. Lydecker refused their request, insisted in the face of evidence to the contrary that the material to be removed was clay, sand, gravel and boulders, and informed them that if they declined to proceed, the contract would be taken from them, relet to others, and that they would be charged with the cost of completing the work in the retained percentages and on their bond. Under such threats the appellees did the work accepted the interpretation of the contract as Col. Lydecker had interpreted it, received payments under the terms of the contract, all under protest, and afterwards brought suit to recover the difference between

18c per cubic yard, the contract price for removing the material designated in the contract, and $2.24 per cubic yard, the reasonable cost of removing the limestone rock.

The precise issue in this appeal was raised in that case, i. e., that the contractors had accepted the modification of the contract and were thus barred, and the contention of the government was that the appellee had the option, at the time the overtures were made to Col. Lydecker without success, of either abandoning the work and suing for damages, or proceeding under the contract. Having elected to proceed, the government took the position that they were thus barred from recovery.

To this contention this Court answered:

> "We think the right of the appellees to recover is indisputable."

Here there was no attempt made to delve into the technical rules of duress as between private persons dealing on equal terms—there was no discussion of the fear of bodily harm or the emancipation of personal property. This Court applied the clear and basic rules and principles of equity which the situation and special relation warranted.

In referring in general to the obligations of the claimants which the government insisted were a condition precedent to recovery, or which barred recovery in that case, Mr. Justice McKenna said:

> "The contention overlooks the view of the contract entertained by Colonel Lydecker and the uselessness of soliciting or expecting any

> change from him. His conduct, to use counsel's description, 'though without malice or bad faith in the tortious sense,' was repellant of appeal or of any alternative but submission with its consequences."

This language is particularly pertinent to the case at bar, and with a change of name accurately describes the situation of this appellant:

Ward vs. Love County, 253 U. S. 17, and Swift Co. vs. United States, 111 U. S. 22.

Ward vs. Love County, 253 U. S. 17, (1920) is another instance of the view of this Court in 1920 as to the circumstances under which a contract, receipt or settlement, obtained by governmental authority, should be set aside.

The case related to the recovery of taxes paid because of the necessity of the taxpayer and pressure of the authorities. It is significant in the present discussion not because of the analogy of the facts, but because it states in broad terms and as a principle of general application the rules of the decision in *Swift Co. vs. U. S., 111 U. S. 22*, which was a case setting aside a settlement with the government arising out of contract.

The *Ward case* was an action by Indian claimants to recover certain county taxes paid. The principal question was whether or not the taxes had been paid voluntarily, thus precluding recovery. The record showed that the claimants protested and objected that the taxes were illegal, but that the county authorities insisted on payment under threat of penalties and sale

for non-payment. Mr. Justice VanDevanter answered the contention of the county on no narrow grounds, but based his decision on the broad principles of justice, saying:

> "The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian Claimants."

What is meant by "coercion" and "compulsion" is shown by reference to the cases cited by Mr. Justice Van Devanter in support of this statement. A case in point is *Swift Co. vs. U. S., 111 U. S. 22*, involving the setting aside of a contract with the government.

In that case the appellant was a manufacturer of matches, and furnished its own dies for the manufacture of internal revenue stamps required upon the sale of its product.

In interpreting the statute, this Court held that the appellant was entilted upon a purchase of over $500 worth of stamps for its own use, to a ten per cent commission payable in *money*.

Extending over a period of eight and one-half years the Bureau of Internal Revenue had ruled that the commission was payable *in additional stamps*, and the appellant accepted all commissions accordingly. On each purchase the appellant had signed a receipt acknowledging the receipt of stamps in satisfaction of its order. Periodically it had acknowledged statements of account rendered by the government to be correct,

complete and true, and in each instance admitted the balance shown to be due, and had subsequently paid the same. At the end of the period it filed a claim with the Bureau for the sum due it, constituting ten per cent upon the aggregate amount of stamps delivered theretofore by way of commissions. The claim was denied and action brought in the Court of Claims. Upon judgment for the government an appeal was taken to this Court.

In reversing the Court of Claims this Court held that the Bureau's attitude was:

> "In effect, to say to the appellant that, unless it complied with the exaction, it should not continue in business. * * * The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right."

> "We cannot hesitate to answer that question in the negative. The parties were not on equal terms; the appellant had no choice. The only alternative was to submit to the illegal exaction, or discontinue its business. It was in the power of the officers of the law and could only do as they required."

To the above statement Mr. Justice Matthews added:

> "Money paid, or other value parted with, under such pressure, has never been regarded as a

> voluntary act, within the meaning of the maxim, *volenti non fit injuria.*"

This Court held further that protest was not essential as it would have been unavailing, and judgment was rendered for appellant as to all sums not barred by the statute of limitations.

This case recognizes the special relation existing between the government and its contractors, and emphasizes the power and control of the government officials. To stress this view further, this Court quotes from one of the cases cited:

> "To make a payment a voluntary one, the parties should stand on an equal footing." *Robertson vs. Frank Bros., 132 U. S. 17.*

The *Swift case* cites and relies upon the *Robertson case.* Referring to the pressure brought to bear by the power of the government pressure "sufficient to influence the apprehensions and conduct of a prudent business man," the court called it "moral duress" and added that:

> "When the duress has been exerted by one clothed with official authority or exercising public employment, less evidence of compulsion or pressure is required."

And further, in referring to the *Swift case:*

> "We held that the apprehension of being stopped in their business by non-compliance with the Treasury regulations was a sufficient

> moral duress to make their payments involuntary."

This Court was careful to point out by specific statement the difference in legal effect, between pressure and compulsion exerted with all the power of official authority, and that exerted between dealing "on an equal footing."

Mr. Justice Bradley, speaking for this Court, quoted at length from the early decision of *Maxwell vs. Griswold, 10 How. 242*, where, referring to pressure brought to bear by government officials by which claimants were "coerced to do an act in order to escape a greater evil," it was said "nor it can hardly be meant in *this class of cases* that to make payment involuntarily it should be by actual violence or physical duress. It suffices if the *payment is caused on the one hand by an illegal demand and made on the other part reluctantly and in consequence of that illegality.*"

To quote from the case:

> " * * * it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary."

The same principles should apply whether the transaction with the government is a payment, receipt, contract or modification of contract.

Conclusion

The cases cited make clear the principle that where a plaintiff has made an alleged settlement with the government, which he seeking to set aside, whether the settlement be deduced from a receipt, acceptance of payment, entering upon performance under new terms, an acceptance of an award or a new contract, he is entitled to have the settlement set aside where it is shown that he was not dealing on equal terms with the other party because he was subject to the power and control of the government over his business, and that he was dealing with executive officers of the government whose attitude was repellant of appeal or any alternative but submission with its consequences, and he gave the receipt, accepted payment, entered upon performance or accepted the award because he was required to do so by the officers, acting under an erroneous and illegal interpretation of the rights of the government. Under such circumstances, the action of the plaintiff in accepting the alleged settlement is not to be deemed a voluntary act within the meaning of the phrase, *volenti non fit injuria*, if the act was done under protest, and in view of the threats of the officers which they had power to carry out, and which if carried out would inflict ruinous consequences on the plaintiff's business. Of course, such threats must be those "sufficient to influence the apprehensions and

conduct of a prudent business man" and the coercion brought about by them must be to "do an act in order to escape a greater evil."

Whatever designation may be given to the act which makes it "involuntary" in law, whether it is called "coercion," "compulsion," "pressure," "constraint," "a species of duress," or "moral duress," the principles of justice recognizing the particular relation between the parties remain the same and are decisive. They are entirely applicable to the case at bar. The cases cited leave no doubt of the right of the appellant to recover here or of the legal or equitable obligation of the government to reimburse the appellant for its losses, notwithstanding the "modified contract" forced upon it by General Pierce.

Indeed, the case at bar in many respects is stronger and more clearly calls for relief than those cited. Here there was not only a clear and obvious misinterpretation of the right of the government under the contract, insisted on by the Ordnance Department in claiming the right to cancel the contract, but the cancellation proposal was so palpably without any consideration whatever moving to the claimant and the other mills that in itself it shows the injustice and lack of fairness on the part of the government, and clearly shows that the mills are justified in asking to have it set aside. This would restore to the parties the rights which they would have had if such modification agreement had not been forced. Aside from the argument that the so-called modified contract should be set aside on the ground of no consideration for it, the lack of considera-

tion—the fact that the government gave up nothing and made no concession of any advantage of any kind to the claimant, throws a flood of light upon the allegation that it was secured by threats, compulsion, and coercion, and is supported by the record clearly showing that it was so secured. Besides, this lack of consideration makes easy of application the equitable principles involved, for the setting aside of the modified contract does not involve the retention of any benefit which the claimant has secured by such contract and which cannot now be restored to the other party. That the modified contract was wholly one-sided in its benefits and that it was simply a case of one party doing less than he was already bound to do without any corresponding benefit to the other side is clear and has already been explained. The government was obligated to take a certain amount of linters. Its so-called settlement proposal was simply to take less and force the loss for the balance on the claimant. It got nothing but its loss. There was no doubt of the liability of the government on its contract; there was not even any disputable question to be compromised between the parties.

The record shows that General Pierce arbitrarily decided that he had a right to terminate the contract because he said so far as he was concerned the war was over, and then he forced his interpretation upon the mills, with all the power that their business obligations, commitments to the farmers, control of the Food Administration and War Industries Board, fear of loss of good-will and financial disaster enabled him in this particular instance to exert so successfully. The

fact of this pressure, the compulsion exerted and the necessity of the claimants, having "no alternative but submission," are not disputed in this case. They were set forth at length by the Board of Contract Adjustment upon the hearing of this case before that Board, which had the advantage of having seen, heard and examined all witnesses in person. (Decision of the War Department, Board of Contract Adjustment, Vol. II, p. 314.)

As the rules applied by the Court of Claims to the facts in this case are contrary to the well-settled principles laid down by this Court in the cases above cited, we respectfully ask that the decision of the Court of Claims be reversed, that the Modification of Seller's Contract of Sale be set aside, and that this cause be remanded to the Court of Claims with proper directions for further proceedings and appropriate relief not inconsistent with the decision of this Court.

Respectfully submitted,

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Washington, February 5, 1926.